LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
JUN 13 1958
JOHN T. FEY, Clerk

No. [redacted]65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

On Appeal from the Supreme Court of Ohio

GEO. F. ALGER COMPANY,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS

WILLIAM SAXBE,
Attorney General,
HUGH A. SHERER,
Chief Counsel,
JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 995

GEO. F. ALGER COMPANY,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS

Appellee in the above styled case, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

The appellant is a Michigan corporation engaged in the commercial transportation of property by motor vehicles in interstate commerce.

On July 16, 1953, the Ohio highway use tax law, also known as the axle mile tax law, became effective. This tax required payment for use of Ohio highways of from one-half

to two and one-half cents per mile depending upon the number of axles employed. Vehicles having less than three axles were not included in the classification amenable to the tax.

The Tax Commissioner of Ohio, by virtue of the Ohio highway use tax law, levied assessments against appellant based upon the use of Ohio highways for the periods of April 1, 1954, to June 30, 1954, and October 1, 1955, to December 31, 1955.

The Tax Commissioner's assessments were appealed, eventually resulting in an upholding of his assessments by the Supreme Court of Ohio and a declaration that the Ohio highway use tax law was a valid exercise of the taxing power and that no constitutional safeguards were endangered by the tax.

ARGUMENT

Appellant has raised two principal questions: whether the Ohio highway use tax law is unconstitutional and whether the fact that the Ohio reciprocity board created by Section 5728.15, Revised Code of Ohio, has not entered into reciprocal agreements, pertaining to highway use taxation, with the state of Michigan, denies appellant due process of law and violates the Commerce Clause of the Constitution of the United States.

It is the position of the appellee that these questions are so unsubstantial as not to warrant review by this Court.

Two basic concepts will serve as important guides in viewing the issues here involved in proper perspective:

1. The real legislative purpose in enacting the Ohio highway use tax law was to raise revenue for highway purposes.

2. The users of the highways should pay a fair share of the cost of construction and maintenance thereof.

I

The Ohio Highway Use Tax is Not Unconstitutional

State statutes levying highway use taxes have been considered by this Court on many occasions. These statutes have been consistently held within constitutional limitations unless discriminatory, excessive, levied for an improper purpose, or levied for the privilege of doing business. *Capital Greyhound Lines v. Brice*, 339 U. S., 542; *Hendrick v. Maryland*, 235 U. S., 610, 623, 624.

None of these characteristics can be attributed to the Ohio law.

The tax is nondiscriminatory. All vehicles subject to the tax are taxed according to the same formula whether

used in interstate commerce or intrastate commerce. The exemption of two-axle vehicles was provided by the Ohio General Assembly after thorough studies of the problems of highway construction and wear including the loadometer reports, Appellee's Exhibits A through E, in addition to a consideration of economic factors. The mere fact that expert testimony presented by appellant does not accord with the legislative conclusion is not determinative. Additionally, as observed by the Supreme Court of Ohio at page 428 of *Geo. F. Alger Co. v. Bowers,* 166 Ohio St., 427:

> "* * * It is axiomatic that the General Assembly in imposing a tax has the power to make reasonable classifications therein exempting from the tax persons who in some other way contribute their fair share to the maintenance of the operation for which the tax is imposed. In relation to the highway use tax, it was evidently the opinion of the General Assembly that the owners of trucks with only two axles carried their fair share of the cost of the operation and maintenance of highways through the imposition of the other motor vehicle taxes. It further must have determined that the relative damage to the highways increased proportionately with the number of axles. All these are questions of fact which must be determined by the General Assembly, and, its determination being neither unreasonable nor arbitrary, the court will not substitute its judgment for that of the General Assembly."

The tax is not excessive. Mr. O'Leary of the Department of Finance testified (R., 276, et seq.) that for the fiscal year ending June 30, 1954, the state collected approximately $189 million from various highway taxes, of which approximately $5.4 million came from the axle-mile tax which was effective only part of that period (R. 280-281). He also testified that for the first four months of the fiscal year ending June 30, 1955, axle-mile collections approximated $5.3 million, while other highway taxes were

continuing at about the 1954 rate (R., 308-309). There is no limitation, statutory or constitutional, on the amount which the state may raise and spend for highway purposes. Further, even if the state were restricted to an over-all amount, there is nothing which requires it to eliminate the revenue from the axle-mile tax. The highways of Ohio are built, owned and maintained by the state of Ohio. Whether the federal government, as of 1956, has assumed 90% of the cost of interstate highways is immaterial. *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U. S., 495, 92 L. Ed., 99. The financial strain upon appellant's business is likewise immaterial. *Grolbert v. Board of Railroad Commissioners of State of Iowa,* 60 F. 2d, 321. The axle-mile tax is predicated upon the use of Ohio highways and the state of Ohio is entitled to charge for that use. *Capital Greyhound Lines v. Brice,* 339 U. S., 542.

The purpose of the Ohio highway use tax is proper. The tax is levied exclusively for highway purposes. Sections 5728.06 and 5728.08, Revised Code of Ohio, specify the use to be made of the revenues raised by the levy. The base of the tax is mileage traveled in Ohio, which indicates a contribution for the use of the highways as opposed to payment for the privilege of doing an interstate business. See *Interstate Transit, Inc., v. Lindsey,* 283 U. S., 183. Additionally, Article XII, Section 5a, of the Ohio Constitution prohibits the expenditure of such taxes for other than highway purposes.

Highway use taxes based upon weight and distance have been consistently sanctioned. *Continental Baking Co. v. Woodring,* 286 U. S., 352; *Grolbert v. Board of Railroad Commissioners of State of Iowa,* 60 F. 2d, 321; *Mid-State Freight Lines v. Bates, et al.* (N. Y.), 279 App. Div., 451, 111 N. Y. S. 2d, 578, affirmed without opinion 304 N. Y., 700, 107 N. E. 2d, 603, certiorari denied 345 U. S., 908; and *State v. Goeson,* 65 N. D., 706, 262 N. W., 70. The selec-

tion, by the Ohio General Assembly, of axles in substitution for weight would seem to be within the broad latitude authorized the states in devising a formula for exacting compensation for highway use.

There is a reasonable relationship between the Ohio formula of highway use taxation and highway use. Section 5577.04, Revised Code of Ohio, appended hereto, establishes load limits for single axle and for axle combination and spacing. Exhibit 2 shows that the graduations of the Ohio highway use tax are proportionate to actual load limits. Exhibit C-1 shows that in actual studies of highway loads transported the proportionate graduations existed. While there may not be a mathematical exactness in the Ohio formula, in consideration of the administrative convenience which will accrue to the state of Ohio from the application of the formula, it is certainly within the area of "rough approximation." *Capital Greyhound Lines v. Brice*, 339 U. S., 542; *Grolbert v. Board of Railroad Commissioners of State of Iowa*, 60 F. 2d, 321; and *Roadway Express v. Murray*, 60 F. 2d, 293.

II

The Refusal of the Ohio Reciprocity Board to Enter Into Reciprocal Agreements With the State of Michigan Waiving the Ohio Highway Use Tax Does Not Deprive Appellant of Due Process of Law

Reciprocity is not an essential of valid highway use taxation. *Kane v. New Jersey*, 242 U. S., 160.

The legislative intent in the enactment of the Ohio highway use tax law was to raise revenue for highway purposes. Section 5728.06, Revised Code of Ohio.

Reciprocity denotes a mutual exchange of favors. The provisions of Section 5728.15, Revised Code of Ohio, authorize reciprocal agreements with other states which levy a highway use tax in addition to motor vehicle registration

fees. The state of Michigan does not levy a highway use tax, as contended by the appellant, but, rather, the so-called Michigan highway use tax is in reality a public utility fee, comparable to a like imposition by the state of Ohio. Beyond this the Michigan public utility fee is graduated from 1 to 2 mills per mile, one-tenth the amount of the Ohio highway use tax, thus negativing the possibility of a mutual exchange of favors, even if the Michigan public utility fee could be considered a highway use tax.

The Ohio reciprocity board is authorized to confer with legislative bodies and other proper officials of sister states in determining whether to reciprocally waive the highway use tax. Nothing in this authorization and nothing in the nature of the problem requires that the Ohio reciprocity board confer with appellant, or give appellant an opportunity to be heard, before deciding whether a particular reciprocity agreement would be in the best interest of the state of Ohio.

CONCLUSION

This appeal does not present a substantial constitutional question which requires review by this Court. Accordingly, the motion to dismiss should be granted.

Respectfully submitted,

WILLIAM SAXBE,
Attorney General,
HUGH A. SHERER,
Chief Counsel,
JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

APPENDIX

Section 5577.04, Revised Code of Ohio

No vehicle, trackless trolley, load, object, or structure having a maximum axle load greater than sixteen thousand pounds when such vehicle is equipped with solid rubber tires, or greater than nineteen thousand pounds when such vehicle is equipped with pneumatic tires, shall be operated or moved upon improved public highways, streets, bridges, or culverts. The maximum wheel load of any one wheel of any such vehicle shall not exceed six hundred fifty pounds per inch width of tire, measured as prescribed by section 5577.03 of the Revised Code, nor shall any solid tire of rubber or other resilient material, on any wheel of any such vehicle, be less than one inch thick when measured from the top of the flanges of the tire channel.

The weight of vehicle and load imposed upon the road surface by any two successive axles, spaced four feet or less apart, shall not exceed nineteen thousand pounds for solid tires, nor twenty-four thousand pounds for pneumatic tires; or by any two successive axles, spaced more than four feet but less than eight feet apart, shall not exceed twenty-four thousand pounds for solid tires, nor thirty-one thousand five hundred pounds for pneumatic tires; or by any two successive axles, spaced eight feet or more apart, shall not exceed twenty-eight thousand pounds for solid tires; nor thirty-eight thousand pounds for pneumatic tires; nor shall the total weight of vehicle and load exceed, for solid rubber tires, twenty-eight thousand pounds plus an additional six hundred pounds for each foot or fraction thereof of spacing between the front axle and the rearmost axle of the vehicle, nor exceed thirty-eight thousand pounds

plus an additional eight hundred pounds for each foot of spacing between the front axle and the rearmost axles of the vehicle for pneumatic tires; nor shall the weight of vehicle and load imposed upon the road surface by any vehicle exceed seventy-eight thousand pounds for pneumatic tires; nor shall such weight of vehicle and load exceed, for solid tires, eighty per cent of the permissible weight of vehicle and load, as provided for pneumatic tires.